No. 86-1717

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KALIMA JENKINS, *et al.*,

Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

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All parties agree that cognizable constitutional violations producing a significant segregative effect in more than one district warrant interdistrict relief. Milliken v. Bradley, 418 U.S. 717, 744-45 (1974). All parties agree as well that, while the facts determine whether "significant effects" exist, the law first must declare what and whose violations count in totaling those effects.

Respondents do not dispute that the courts of appeals are divided on that legal question. In the Third and Seventh Circuit, all consititutional violations count -- those by the State as well as the affected school districts; those by housing as well as school officials; and those that steer blacks and whites to opposite sides of preexisting lines as well as those that draw lines between them.[1] In the Fourth and Sixth Circuit, only violations by the surrounding school

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[1] Hoots v. Commonwealth, 672 F.2d 1107, 1121 & n.13 (3d Cir. 1982); United States v. Board of School Commissioners, 637 F.2d 1101, 1109-11, 1115 (7th Cir. 1980); United States v. Board of School Commissioners, 573 F.2d 400, 410 (7th Cir. 1978); Evans v. Buchanan, 416 F. Supp. 328, 339-40 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977) (en banc). See, e.g., SSD Brief, 24 (acknowledging that the Third and Seventh Circuits impose inter-district relief encompassing innocent school districts based on violations -- including "public housing" violations -- by the State).

districts count; violations by the State do not.[2]

Respondents acknowledge, moreover, that the four-judge plurality and the four dissenting judges below give conflicting answers to the question -- Which violations count? Judge Arnold and Chief Judge Lay for himself and Judges Heaney and McMillian conclude that the case should be decided under the Third and Seventh Circuits' rule "that a school district can be made to participate in an interdistrict remedy even if it is not 'personally' guilty of violating the Constitution, that such relief is appropriate where a State's constitutional violations have contributed to interdistrict segregation, . . . and

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[2]Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324, 328, 332 n.15 (4th Cir. 1984); Bell v. Board of Education, 683 F.2d 963, 968 (6th Cir. 1982); Bradley v. School Board, 462 F.2d 1058, 1066 (4th Cir. 1972) (en banc), aff'd without opinion by an equally divided Court, 412 U.S. 92 (1973).

that there is nothing unique or peculiar about housing agencies that would take them out of this rule."[3]

On the other hand, as the SSDs themselves point out, Judge Gibson's plurality opinion concludes that the Third and Seventh Circuit precedents "'have no applicability to the present case.'" SSDs Brief, 25 (quoting 99a, Opinion of Gibson, J.) (emphasis supplied by the SSDs). Instead, Judge Gibson derives his rule of decision from the Fourth Circuit view that "'[a]n independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial imbalance in other districts,'" and the Sixth Circuit view "'declin[ing] to accept'" the "'argument

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[3] 149a-51a (Opinion of Arnold, J., dissenting) (citing Hoots, supra and Board of School Commissioners, supra). Accord, 190a-207a (Opinion of Lay, C.J.).

that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies.'"[4]

Without disputing that this legal question divides the Circuits, respondents argue that the petitions should be denied anyway because, they say, that legal question -- notwithstanding all the ink spilled on it below -- is not presented by this case. Instead, respondents argue, the case is controlled by a handful of one- or few- word quotations in the June 5, 1984 Opinion stating that some un-specified violations considered by the

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[4]62a-64a, 67a-68a (Opinion of Gibson, J., quoting Goldsboro, supra, 745 F.2d at 328; Bell, supra, 683 F.2d at 968). Even respondents cannot agree: The SSDs suggest that the only State violation that counts is "intentional illegal gerrymandering." SSD Brief, 24-25. The State calls the gerrymandering distinction "wholly imaginary." State's Brief, 18.

district court in that opinion had "de minimis" effects.

Respondents are wrong. They arrive at their conclusion only by assiduously obscuring how the district court, in making the June 5 "insignificant effects" findings, answered the question -- Effects of what? What violations count?

Because the district court answered that only the SSDs' vioations count and refused to consider the State's violations, the affirmance below inescapably rejects the Third and Seventh Circuit rule and adopts a conflicting view. For under the Third and Seventh Circuit rule that all the violations count, "insufficient effect" findings reached by summing less than all the violations cannot possibly resolve the case and instead require

reversal and a remand for consideration under a properly inclusive standard.[5]

There is no need to speculate about how the district court answered this critical question of law.

At trial, the district court stated:

> As I read Milliken and its progeny, the constitutional violation must have occurred in one of the suburban districts that had a segregative effect upon the Kansas City, Missouri School District. Now that's Milliken as I read it. And 80 percent of

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[5] E.g., United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717 (1983) (reversing and remanding because the district court's "insufficient evidence of intent" finding may have been influenced by the trial court's improperly parsimonious view of what counts as proof of intent); Rogers v. Richmond, 365 U.S. 534, 547 (1961) ("[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them"); United States v. United States Gypsum Co., 333 U.S. 364, 394, 396-97, 402 (1948) (Rule 41(b) dismissal premised on district court's finding of "insufficient evidence" of conspiracy reversed because the district court's unduly narrow standard for measuring the "quantum of proof" of conspiracy excluded evidence that should have been considered). See Thornburg v. Gingles, 478 U.S. ___, 106 S. Ct. 2752, 2782-83 (1986) (collecting cases).

> [plaintiffs'] proof in this case so far would not comport with Milliken. Now, if I'm reading Milliken wrong, then I'm reading it wrong.[6] (T.7342.)

Then, in its June 5 Opinion, rejecting "plaintiffs' 'effect' theory . . . that the SSDs may be included in an interdistrict remedy even absent any finding that they have committed specific constitutional violations," the court said again:

> These theories, when considered in light of the evidence and the prevailing legal standards, must be rejected.
>
> Because this is an interdistrict case, all the evidence comprising this voluminous record must be weighed by that standard. In-

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[6] And: "All I have to say, my interpretation of the Milliken case is if you're not claiming violations of constitutional rights by the suburban districts, its irrelevant." T.10,057. And: "You're misreading Milliken. The violation must be incurred by the district you're seeking to join in the remedy." T. 6767. And: "Absent conduct of these independent districts which was the violation of students' civil rights, absent that, there's absolutely no obligation on the part of these independent districts." T.4689.

> tradistrict cases are inapplicable. The linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each defendant that substantially caused segregation in another district. (352a, 284a-85a.[7])

And again:

> The [Milliken] majority considered and rejected [plaintiffs'] position demanding instead that there be a violation, or cause, by each defendant district as well as an interdistrict effect.
>
> While it may be within the province of another Court to review and rewrite the standard, it is this Court's obligation and duty to apply the law, as presently composed, to the facts of this case. That application compels the Court to reject plaintiffs' theories and grant the suburban school district defendants' motions for judgement pursuant to Rule 41(b). (304a-05a.)

And again:

> One aspect of [plaintiffs'] theory, white flight, does not implicate any SSD and must be rejected. There is no evidence that any school official of the SSDs acted to lure white families or to discourage black families

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[7]Emphases in this and the following passages are supplied; citations and quotations are omitted.

> from moving into their districts . . . .
>
> The Court finds that Dr. Orfield's testimony concerning racial transition within the KCMSD has only intradistrict implications. There was nothing in Dr. Orfield's testimony that would constitute credible evidence that <u>any SSD</u> caused or contributed to cause white flight from the KCMSD.[8] (353a-54a.)

And again:

> Even accepting Dr. Kain's conclusion that the present segregation is due to discrimination, Dr. Kain offered no evidence or opinions tending to show that any actions or inactions <u>of</u>

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[8]Quoting only the words "intradistrict implications" from the last paragraph, the SSDs claim that the district court found no interdistrict effects from the "white flight" violation. SSDs Brief, 7. The SSDs omit the district court's very next sentence, however, which explains precisely <u>why</u> the court believed that violation had only "intradistrict implications." Because: "There was nothing in Dr. Orfield's testimony that would constitute credible evidence that <u>any SSD</u> caused or contributed to cause white flight from the KCMSD." When, however, the district court in its later opinions undertook to analyze the violations of <u>the State</u> and the effects of <u>those</u> violations, its opinions tell an entirely different story: "The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts . . . ." August 25, 1986, Opinion of the District Court, at 1-2.

> any SSD contributed in any significant way to causing the racial residential separation he described. The Court finds that none of the SSDs did or failed to do anything which had any significant effect on residential patterns in the Kansas City metropolitan area. His testimony, therefore, does not support plaintiffs' claims for relief against the SSDs. (356a.)

And again:

> Although the thrust of Mr. Rabin's testimony was that blacks have been confined within the KCMSD, absolutely no credible evidence pointed to actions by any of the SSDs causing this condition to exist. The Court finds that blacks are not constrained within the KCMSD by any actions of the SSDs.[9] (357a.)

And again, concluding the discussion of housing evidence:

> Based on the evidence presented, the Court is compelled to find that no SSD in any significant way influenced the housing pattern's in the Kansas City metropolitan area. And, as discussed supra, the Court rejects the plaintiffs' 'effects' theory that

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[9]The SSDs portray this passage as follows: "The district court added that 'blacks are not constrained within the KCMSD.'" SSDs Brief, 7. What the district court actually said is: "blacks are not constrained within the KCMSD by any action of the SSDs." 357a.

> liability may be placed upon the SSDs for being the recipients of people moving for whatever reason. Absent a nexus between conduct of the defendant SSDs and the housing actors, the Court will not find the SSDs liable for racial imbalance that may be attributed to policies or practices of the independent housing actors. Bell v. Board of Education, 683 F.2d 963 (6th Cir. 1982). (370a-71a.)

And yet again, explaining why the court was dismissing the SSDs without first adjudicating the liability of the State:

> Whether plaintiffs' evidence was sufficient to sustain a finding of liability against other actors in the housing market is irrelevant to the instant motions to dismiss filed by each SSD defendant. The nexus necessary must be between the conduct of the defendant school districts and actions of those responsible for shaping residential patterns. The absence of such a connection forbids a finding of liability against the SSDs to remedy any racial imbalance that may be attributed to to those housing market actors. Bell v. Board of Education, 683 F.2d 963 (6th Cir. 1982).[10] (508a-09a.)

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[10]Notwithstanding HUD's confusion, the second question presented in 86-1717 includes that agency among the actors whose segregative conduct the district court erroneously ruled "irrelevant" in the June Opinion. 508a-09a. See Petition in 86-

Accordingly, although the district court surely concluded in its June 5 opinion that "plaintiffs' evidence is only de minim[i]s and is therefore legally insufficient to justify the relief sought against the suburban school district defendants," that conclusion unrelentingly begs the question -- Evidence of what? What is de minimis? What effects are, as the district court was careful to say, "legally insufficient"?[11] And just as persistently, the district court answered that question:

> After hearing the presentation of plaintiff's evidence and before any defense, the Court dismissed the

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1717, at i-iii. The opinions of Judge Arnold and Chief Judge Lay elaborate how the district court's and plurality's controversial interpretation of Milliken, misinterpretation of Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), and related legal errors caused HUD's dismissal. 160a-65a & nn.9-10, 185a-90a, 214a-19a.

[11]The State misquotes this passage, leaving out, without elipses, the critical word "legally." State's Brief, 4.

> suburban school districts. Plaintiffs simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district. See order filed June 5, 1984. (September 17, 1984 Decision, 520a-21a.)

Nor must this Court speculate about whether the State's admitted violations had interdistrict effects. For, in its September 1984 Opinion, after dismissing the SSDs and continuing the trial against the State,[12] the district court made extensive "interdistrict effect" findings against the State -- albeit solely in support of its allocation to the State rather than the Kansas City District of a

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[12]The State's case at trial following the SSDs' dismissal consisted principally of the testimony of three expert witnesses, each of whom devoted all his testimony to refuting the interdistrict claims against the State. T.18,505-19,834, 20,625-807, 21,982-22,110. The district court "rejected" all three experts' conclusions. 536a.

majority of the costs of the intradistrict remedy.[13]

Juxtaposed, then, to the "insignificant effect" findings in the June Opinion, in which only the SSDs' conduct was at issue, is an "equal and opposite" series of "substantial effect" findings in the September Decision in regard to the State's interdistrict violations. For example, discussing the city-

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[13] See July 6, 1987 Order, at 13 (adopting 207a-15a, Opinion of Lay, C.J.). Indicative of the interdistrict focus of the September Decision are: 522a-25a (reviewing claims that: "Missouri acted to perpetuate racial segregation by . . . supporting racially-identifiable interdistrict arrangements;" "the State's acts or omissions caused the surrounding districts to be predominantly white;" the State and HUD "provid[ed] funds and insurance to suburban areas where access to blacks was restricted"); 571a ("blacks were being located [by the State] primarily in the southeast part of Kansas City while whites were located throughout the Kansas City area"); 574a, 578a, 579a, 584a (State and federal housing activity in "Independence, Liberty and Lee's Summit," "the suburban areas," "the 11 suburban school districts," "predominantly white North Kansas City," and "outside the KCMSD"); and 595a (the State "perpetuat[ed] a dual housing market in the metropolitan Kansas City area").

wide effects of the State's pre-1954 interdistrict system of segregating schools, the district court found:

> Each school district in Missouri participated in this dual school system before it was declared unconstitutional in Brown I. Districts with an insufficient number of blacks to maintain the state-required separate school made interdistrict arrangements to educate those children. Undeniably, some blacks moved to districts, including the KCMSD, that provided black schools. (531a-32a.)

And:

> The Court finds the greatest influx of blacks came from southern and border states. . . . This in-migration coupled with a high birth rate resulted in the Kansas City black population doubling from 41,574 in 1940 to 83,740 in 1960.
>
> Before 1954, access to schools was one of many reasons some blacks chose to move to the KCMSD. Economics and job opportunities were also major factors in black migration. Often jobs would pull migrants to the city, and then availability of schools would influence, more specifically, what housing choice would be made within the city. (533a-34a.)

With regard to the State's housing violations, the district court found:

> In the past the State has taken positive actions which were discriminatory against blacks. [List of discriminatory actions omitted.] These actions had the effect of placing the State's imprimatur on racial discrimination. It created an atmosphere in which the private white individuals could justify their bias and prejudice against blacks. . . . This had and continues to have a significant effect on the dual housing market in the Kansas City area. (601a-02a.)

Consider, finally, the district court's combined assessment of the State's school and housing violations:

> The Court finds the dual housing market which still exists to a large degree today impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment. The Court finds there is an inextricable connection between schools and housing. "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods." (536a-37a, quoting Swann v. Char-

lotte-Mecklenburg Board of Education, 402 U.S. 1, 20-21 (1971)).

It is not true, then, as respondents imply, that the district court in its June Opinion answered an all-encompassing--"Were the effects enough?" -- with a comprehensive -- "No." Rather, rejecting plaintiffs' legal theory and the Third and Seventh Circuit precedents on which plaintiffs relied, the district court in June held as a matter of law that it would not consider the State's violations and would consider only the SSDs'. See 508a (effect of the State's violations "is irrelevant to the instant motions to dismiss filed by each SSD defendant").

Only, therefore, in September, with the SSDs out of the case, did the district court finally consider the effects of the State's violations -- concluding that they were "important," "significant," "city"-wide, "area"-wide, "large," "often," and

"continu[ing]." 531-34a, 536a-37a, 601a-02a. Persisting even in September, however, in the conclusion that "a federal court has no power to restructure the operation of local and state government entities absent a constitutional violation by those entities," the district court again denied interdistrict relief. 608a.

Had a district court in the Third or the Seventh Circuit reached this conclusion, the result undeniably would have been a reversal and remand. See authority cited supra notes 1, 5. Instead, the district court reached this conclusion in the Eighth Circuit; and instead of remanding, the Eighth Circuit affirmed--the four-person plurality holding "irrelevant" the Third and Seventh Circuit decisions and relying instead on the contrary Fourth and Sixth Circuit view.

The courts of appeals cannot agree on the meaning of this Court's decision in Milliken. As a result, federal courts in Delaware and Illinois are reorganizing and desegregating metropolitan-area school districts, while those in Missouri and North Carolina are not. These petitions present that conflict. The Court should grant certiorari to resolve it.[14]

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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[14]Respondents do not dispute that the State's enactment of H.B. 171 in 1957 continues today to have the substantial interdistrict effect of keeping the 74 percent minority Kansas City District from automatically expanding to the 73 percent white boundaries of the City of Kansas City. All that respondents argue in regard to this "failure to dismantle" violation is that the courts below properly refused to consider it because it was not intentional. See State's Brief, 3; SSDs' Brief, 16-17. Having been rejected by the Court in Dayton Board of Education v. Brinkman, 443 U.S. 526, 538-42 (1979), this conclusion of the courts below supplies a separate grounds for certiorari.

Respectfully submitted,

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